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ABSTRACT

A study of purposes, processes, and results of faculty evaluation in higher education looks at court litigation and the criteria used--or not used--in evaluation: student evaluation, peer evaluation, and faculty qualities examined in courts (defamation of character, immorality, overt undesirable behavior, incompetence, lack of qualifications). Methods used by West Virginia in handling faculty evaluation are examined. It is concluded that thorough faculty evaluation will be more important than ever in a period of retrenchment. It is found that the courts have generally taken a hands-off approach to evaluation, or have supported the institutions if they followed appropriate procedures, recognizing the necessity for institutional autonomy in such matters. Guidelines and future considerations for both faculty and administrators are given. It is recommended that faculty maintain good contacts with administrative authority; have a third party present when dealing with a difficult situation with students or administrators; keep written memos and full records; design and use student evaluations; avoid verbal attacks on administrators; keep current on laws, regulations, and policies that might affect the teaching position; and keep out of categories such as "immoral, behaviorally undesirable, or incompetent". It is recommended that administrators: keep aware of policies and regulations; be aware of their roles in carrying out these practices; keep to relevant issues and procedures in evaluation; guarantee that evaluators are competent; maintain communication with faculty; use legal counsel, be consistent, and create an atmosphere of fairness. (MSE)

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FACULTY EVALUATION IN HIGHER EDUCATION:

A REVIEW OF COURT CASES AND IMPLICATIONS FOR THE 1980's

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TABLE OF CONTENTS

	page
Introduction	1
Definition of Performance Evaluation	2
Reasons for Utilizing Higher Education Evaluations	2
Higher Education Administrators Must Follow EEOC Guidelines	3
The Evaluation Procedure: How Are Faculty Evaluated?	4
The Role of the Courts Concerning Faculty Evaluation in Higher Education	11
Do Courts Look at Student Evaluations of Faculty?	14
Do Courts Look at Peer Observations and Evaluations?	17
What Faculty Qualities Are Examined in the Courts?	18
Defamation of Character	18
Immorality	20
Overt Undesirable Behavior	23
Incompetence	26
Lack of Qualifications	29
How Does West Virginia Handle Faculty Evaluation?	31
Summary: An Analysis Based on Faculty Evaluation Court Cases	34
Recommended Guidelines and Future Considerations	37
Footnotes	41
Bibliography	43

INTRODUCTION

"As dean of the college, I am very sorry to have to tell you of your non-renewal of contract. I am certain you will understand the problems due to our decreasing enrollments. Many tenured faculty have been given similar notification. We had to utilize a special evaluatory system for such faculty cutbacks. We would be happy to help you in any way in your search for another position."

The real questions now emerge! Does enrollment decline justify faculty cutbacks? How do administrative staffs <u>really</u> decide on which faculty to release? Was the evaluation a fair means of release? How much emphasis was placed on student evaluations of faculty? Would the courts support the university or the tenured professor in such a situation? How does faculty evaluation work legally and how would the courts act in evaluation cases?

In making various types of faculty personnel decisions, higher education administrators have found that it has become increasingly hazardous to defend such decisions. Denial of promotion or tenure or termination of employment are more likely to result in legal action than ever before. Because the numbers of suits are rising steadily and are likely to continue to rise, it becomes imperative to examine the relevant court cases which have involved a variety of different administrative clashes over evaluation decisions, reasons for utilizing performance evaluation, means for collecting data systematically, legal considerations in performance evaluation, and recommended guidelines and implications for future considerations.

This paper is thus designed to examine the nature of faculty evaluation,

to reflect on major critical points, and to predict the role of faculty evaluation in the 1980's.

DEFINITION OF PERFORMANCE EVALUATION

Performance evaluation by its common usage and also for clarity in this paper refers to a wide variety of forms and is administered under a various combination of conditions. Examples include peer or colleague evaluations, rated sheets of specific behaviors by scores, written subjective evaluations by department chairpersons, student questionnaires and feedback, public complaints of immorality, or any other means, formal or informal, subjective or objective, through which information is collected, analyzed, and utilized for the purpose of making higher education personnel decisions.

REASONS FOR UTILIZING HIGHER EDUCATION EVALUATIONS

Every institution makes a judgment about each faculty member every year. An educational administrator who is given this task must be able, if a court case arises, to demonstrate why and how these decisions were made. Purposes for using such higher education faculty evaluations might include:

1. improving effectiveness of staff members
2. making tenure decisions
3. making salary, transfer, and promotional decisions
4. identifying faculty members' abilities
5. facilitating faculty placement
6. facilitating understanding and communication between administration and faculty [1]

The criteria for merit advancement has been an ongoing issue in higher education. In the late 1960's the issue of faculty evaluation peaked as students' protests for accountability increased. Research-oriented universities and colleges began searching for criteria and techniques for the evaluation of

teaching effectiveness in higher education.

Although the means for evaluation may be either informal or formal, in a court of law the informal means for assessing faculty are likely to be found impractical and even illegal. Thus, it is critical that evaluation data be collected and analyzed in a legal, formal procedure for all higher education faculty.

HIGHER EDUCATION ADMINISTRATORS MUST FOLLOW EEOC GUIDELINES

Several sections of the "Guidelines" (1970) apply to both the development and use of evaluatory systems which affect higher education faculty. For example, the term "test" is defined as "any paper and pencil or performance measure used as a basis for any employment decision--including formal, scored, quantified, or standaradized techniques of assessing job suitability including specific or disqualifying personal history requirements, scored interviews, biographical information blanks, interviewer's rating scales, scored application forms, etc."[2]

In the higher education setting, most faculty evaluation techniques would fall under the definition of a "test" as defined in the Guidelines. A recent review of court cases involving such performance evaluation suggests that courts appear to be using these "Guidelines". Such examples include an EEOC Decision 74-106 (1974) in a case of refusal to renew a contract when the teacher had the highest evaluations and court favored re-appointment and also an EEOC Decision 75-018 (1975) which supported the school board in their termination of a female teacher who had received two unsatisfactory performance evaluations.

Educational administrators must use a formalized evaluation technique that is in compliance with such EEOC Guidelines if it is to be supportable in a court of law.

THE EVALUATION PROCEDURE: HOW ARE FACULTY EVALUATED?

Colleges and universities around the country vary so much in their methods of faculty evaluation that it is difficult to find a commonly used pattern. Basically, the evaluation procedure encompasses three major steps: 1) defining appropriate criteria for judging teacher effectiveness, 2) developing and administering the necessary assessment devices, and 3) getting faculties to incorporate the procedures and act on the results. [3]

In the case Harkless v. Sweeny Independent School District of Sweeny, Texas (11 FEP 1005, 1975), it was pointed out that objectivity in faculty evaluation could be achieved by adhering to the following three guidelines:

1. The language in the evaluation instrument used to describe each characteristic to be measured must be composed of words which are reasonably precise and uniform in meaning.
2. There must be a fairly specific standard of measurement to guide the evaluator in ascribing a particular value to a particular characteristic.
3. There must be a reasonably well-defined system for assigning relative weight to the characteristics measured.

It cannot be overemphasized of the need to have clear-cut evaluatory procedures for determining faculty rating decisions.

Two court cases in particular involving specific use of evaluation procedures were most explicit in their explanations and thus are presented for their significance for institutions in the 1980's. The first case is Green v. Bd. of Regents of Texas Tech. University, 474 F 2d 594 (5th Cir., 1973).

> Dr. Lola Beth Green, Associate Professor of English at Texas Tech. Univ. since 1946 claimed that she was refused promotion to full professor because of her sex. The District Court looked at the entire administrative evaluative procedure through which her application was processed:

1. Head of English Department with voting of department members
2. Dean of College of Arts and Sciences (6 member promotions and tenure committee of Arts and Sciences votes on question to advise the Dean.)
3. Graduate Dean
4. Vice President of Academic Affairs
5. President of Texas Tech.
6. Tenure and Privilege Committee of Texas Tech.
7. Academic Committee of Texas Tech.--Board of Regents
8. Full Board of Regents of Texas Tech. Univ.

Only at the first stage did Dr. Green's application receive consideration. (5-3) Thereafter, at every level of review was a unanimous negative response. These responses were based on deficiencies in teaching, research, student complaints, disinclination of graduate students to seek her assistance, etc.

District Court: "The findings and decision of academic administrative bodies were reached by correct procedures of evaluation and supported by substantial evidence."

U. S. Court of Appeals: "Plaintiff's application for full professor was given fair and impartial treatment and refusal of promotion was not based on sex. The University's standards are matters of professional judgment and here substantially every individual or committee in the institution's reviewing body questioned Dr. Green's competence. Affirmed."

As seen by the steps which were spelled out explicitly, the courts backed the University's decision, indicating that they did conduct the evaluation in the correct procedural approach.

Another sample case which also uses precise evaluation procedures is that of Walls E. Keddie v. Pennsylvania State University, 412 F. Supp. 1264 (M.D. Pa., 1976).

In 1964 the plaintiff, Dr. Keddie, accepted a one year temporary research-teaching position as an assistant professor of labor studies at Penn State. In 1965 he accepted an additional 42 week appointment. He was kept on until 1970 at which time he was scheduled for evaluation. (Note: 7 years of satisfactory service are required before tenure is awarded.) Five senior faculty members were assigned to an Ad Hoc Review Committee to evaluate the plaintiff's performance with recommendation for deciding about tenure.

> The committee was an interdisciplinary group of five tenured professors who were chosen by the dean on the basis of their scholarship in departments of social sciences. This committee based its evaluation of the plaintiff on the usual academic criteria of teaching performance, research, public, continuing educational activities, service to the University, and scholarship and professional growth. After careful evaluation, the committee unanimously concluded that "the overall performance of Dr. Wells Keddie has been below the minimum it deems necessary for retention as a tenured staff member."
>
> Plaintiff sued asserting that the committee penalized him for his extracurricular activities such as his vocalization on Vietnam, blacks, politics, SDS advisor, etc.
>
> Courts found that the tenure denial was not based even in part on the plaintiff's political or vocal utterances. He was denied tenure for legitimate documented evaluative reasons. Plaintiff's request for injunctive relief and damages was denied.

The following pages include examples of the final evaluative report of Dr. Keddie because of the thoroughness of such a report which has been upheld in court. This detailed report written by the committee chairman to the dean was not found to be defamatory in any way.

THE PENNSYLVANIA STATE UNIVERSITY

INTER-OFFICE CORRESPONDENCE

Date: May 28, 1971

From: Robert K. Murray, chairman of Dean's Ad Hoc Tenure Review Committee

To: Dean Stanley Paulson

The committee, composed of Gordon DeJong, Carroll Arnold, Grant Farr, and Robert Friedman, met six times between May 17 and May 28. Each session, except the last, involved one and one-half hour's deliberation. After opening remarks by the Dean at the first session, the committee discussed and established the following procedures.

1) The membership of the committee would be confidential and no independent discussions with others would be held concerning the case at hand
2) Any requests for additional information would be handled through the Dean's office only
3) Each committee member would read carefully all the available documents, research reports, publications, and dissertation materials
4) Following the thorough and open discussion of all pertinent matters, any final decisions would be reached by written and secret ballot. Each member would be expected to make a positive, neutral, or negative evaluation of each of the following categories:
   a. Teaching performance
   b. Research and publications
   c. Continuing Education activities
   d. Service to the University
   e. Scholarship and professional growth
5) The results of the balloting on each category would be reported to the Dean by the chairman
6) A summary written report of the committee's proceedings and deliberations would be written by the chairman and given to the Dean, with copies also given to each committee member.

In its deliberations the committee constantly had difficulty in arriving at a satisfactory weighting formula for the various categories listed above. Moreover, it was somewhat confused by the exact nature of this department (Labor Education) and its precise mission. Also, it was hazy about the intended development and future prospects for this academic enterprise. On one occasion (May 26) the committee invited the Dean to give his views on these matters in order to arrive at clearer guidelines. In any event, the committee felt that its assessment of the tenure case in question was also related in a general way to its assessment of the labor education activity as a whole, and to the way in which that activity fitted into the mission of the College of Liberal Arts. At all times, it must be admitted, the committee felt somewhat

uneasy in wrestling with these "weighting" and "mission" matters, especially as they related to the particular performance of Dr. Wells Keddie.

Teaching:

The committee reviewed the teaching assignments, class size, grade distributions, student evaluations, supervisor evaluations, and other such pertinent data concerning teaching. It found some of the evaluations to be good, but also noted adverse comments as well. The committee observed a somewhat slip-shod attitude by Dr. Keddie toward teaching responsibilities, such as class attendance, and a disinclination to use the grading system as normally applied. There was evidence that Dr. Keddie both stimulated and repelled—that is, he tended to polarize his students. Some believed they were subject to indoctrination and that there was a lack of a dispassionate view. The committee was unable to arrive at a clear conception to the quality of the work taught. Since he has been teaching mainly at the 400 level, the committee looked at his teaching performance in that light. The committee was concerned that the class atmosphere was not always conducive to "open" discussion and that a certain pre-selection of students tended to occur which created pressures within a class that were not always academically productive. Many of these students, however, were laudatory of Keddie and gave him high marks as a teacher. He, on the other hand, rarely gave a C, no D's or F's, and a very high percentage of A's.

Publications and Research:

The committee read carefully all of the evidence regarding research and publication:

1) Dissertation "Democratic Behavior and Union Bargaining Power"
2) Article, "Union Democracy—Again," in Western Economic Journal
3) Report, "Impact of the Union Leadership Upon . . . Union Members"
4) Report, "Survey of New Members . . . ."
5) Revised Chapter (from above-mentioned dissertation)
6) Draft of accepted article, "Fish and Futility in Iranian Development"

The committee believed the candidate gave evidence of being able to do scholarly work. It felt the dissertation was of a reasonable quality, and was relatively well-executed. However, it found the other pieces of work deficient in a variety of ways. Neither the published article nor the accepted article represent more than minimum competency; indeed, it was generally agreed that the "Union Democracy—Again" article was below normal minimum publishing standards. The two reports were found to be deficient in design, method, implementation, and, in the case of one, in conclusions. The committee believed that in some respects Dr. Keddie is a victim of his own insistence of defining problems in ways that take him into areas of the social sciences, as well as into areas of economics, where he has only a superficial knowledge or skill. Moreover, the committee observed that his title is "Research Director," yet his performance and his productivity hardly justify such a title. Also, his ability to conduct in-depth studies relating to programs and instruction is marginal, to say the least. The committee also noted that his department head was not recommending him for promotion to associate professor at this time because of his obvious deficiencies in scholarly publications.

Continuing Education:

The committee found this aspect of Dr. Keddie's activities to be his strongest suit. The committee regarded the two syllabi that were given to it to evaluate as being rather impressive. While many of the letters regarding his continuing education performance were relatively perfunctory, there was one that was out of the ordinary and commanded the committee's attention. Dr. Keddie seems to be well-liked by those who worked with him in these various programs. The unions apparently are satisfied with his work. The committee felt that the one major criticism made earlier against Dr. Keddie, relating to combining the union and student movements, needed further proof and therefore the committee disregarded it.

The committee wished that it had been able to receive feedback from the students themselves who were in the various seminars. As it was, it had to rely on testimony from union officials only. What evidence it saw was favorable to Dr. Keddie.

Service to the University:

From the beginning, the committee considered Dr. Keddie's personal political beliefs as irrelevant to its examination unless such beliefs could be shown to have a detrimental effect on his academic performance. The committee did not find any demonstrable definitive connection between the two. On the other hand, the committee did not regard personal beliefs as having a positive effect on performance. That is, the committee regarded Dr. Keddie's personal activities in the political realm as having no more or less valuable or invaluable effect on his academic status as activities by other faculty members on behalf of the Republican or Democratic parties, or on behalf of church denominations, etc. Therefore, the committee observed with some surprise what both Dr. Keddie and his own department regarded as "service to the University." The committee did not consider membership on the New University Conference or speeches given on moratorium days as falling under the category of "service to the University." These result from personal decisions and persuasions, and not from institutional obligations. Nor did the committee regard panelist appearances on WDFM or radio interviews as constituting service to the University. It did consider Dr. Keddie's brief stint on the Faculty Affairs Committee of the College of the Liberal Arts, and his activities as faculty adviser to SDS as constituting such service. Within this framework, the committee found Dr. Keddie's "service to the University" to have been minimal.

Scholarship and Professional Growth:

It was in this category, and in Research and Publications, that the committee found Dr. Keddie to be weakest. The committee believed Dr. Keddie's scholarship, and his potential for growth, to be below average. He seems to have no significant research in progress and he evidences no inclination to begin anything truly "new." It seems obvious that research and scholarship is something he feels he "has to do" and is not something that "he likes to do." His latest article seems to be no more sophisticated than his first and consists of data collected some years ago. He seems to have acquired no additional skills either in research or in evaluative techniques. He appears to be inactive in both regional and national professional associations.

CONCLUSIONS

At its final meeting on May 28, the committee proceeded to ballot on the first four categories, reserving the last category as a general summation or evaluation of Dr. Keddie's performance to date, together with an assessment for the future.

The results were as follows:

	Minus	Neutral	Plus
On teaching:	1	3	1
On publications & research:	5	0	0
On continuing education:	0	1	4
On University service:	3	2	0
	9	6	5

On the general summation category of scholarship and professional growth the result was as follows:

Minus	Neutral	Plus
4	1	0

It is therefore the committee's collective opinion, after careful examination, discussion, and deliberation, that the overall performance of Dr. Wells Keddie has been below the minumum it deems necessary for retention as a tenure staff member.

Robert K. Murray

The individual ballots are attached for your information.

Again, the courts backed Penn State University because of their thoroughness in following precise evaluative procedures and their documentation of steps and reasons. In addition, the criteria and procedures in the evaluation were communicated to the plaintiff. The results were also explained to Dr. Keddie and available for court examination.

THE ROLE OF THE COURTS CONCERNING FACULTY EVALUATION IN HIGHER EDUCATION

A summary of numerous court cases which follow may begin to explain many of the past court reactions to cases involving higher education administration decisions with regard to faculty evaluation. They speak for themselves.

> The judiciary is not the appropriate forum for decisions involving academic rank. A professor's value depends on his creativity, his rapport with students, and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards. Promotion decisions made by a college's faculty, administration and governing board are not normally justiciable. These determinations depend upon evaluations of intangibles such as scholarship, teaching ability, and potential contribution to the institution.
>
> Lewis v. Chicago State College
> 2 FEP 97 (1969)

> The weight to be given scholarly writings and their publications in a tenure decision involves evaluation by those who live in the academic world and who are charged with responsibility of the decision. Scholarship and research have been described as the indispensable tools of the scholar's trade, and as such they should be left to the scholars. Absent of showing of discrimination or other violation or constitutional or statutory rights, the court is guided by the words of Judge Moore: "Of all the fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at the University level are probably the least suited for federal court supervision."
>
> Labat v. The Board of Higher Education of the City of New York, the City Univ. of N. Y., supra, 10 FEP 1449 (1975)

Promotion decisions are usually left to the "academic experts." Courts traditionally are reluctant to overrule decisions made by administrators and faculty members. The only exception to this rule of academic abstention are situations in which the institution failed to follow its own rules in evaluation procedures or if they acted arbitrarily or maliciously. In these cases courts are willing to intervene.

Legal Handbook for Educators

Patricia A. Hollander, J. D.
Boulder, Colorado: Westview Press, 1978

page 162

The commissioner does have power to order tenure, but should exercise it only in the most extraordinary situations. Here there are no circumstances sufficient to justify the imposition of tenure.

New York Institute of Technology v. State Division of Human Rights 385 NYS 2d 685 (N. Y. Ct. App., 1976)

Performance evaluation and like considerations relating to professors' promotions and salary increases involve judgmental decisions which are, at best, difficult, and in the Court's opinion, are best left to those entrusted to make the same, i.e., college administrators.

Goolsby v. Regents of University of Georgia Civil Action No. C-11236 Super. Ct. Fulton County, Ga., 1976

It is not a court's perogative to interject itself into the educational institution.

Nancy Van De Tate v. Boling and Univ. of Tenn. Civil A. No. 8463 U.S. Dist. Ct. 379 F. Supp. 925 (1974)

The court should not interfere with faculty and university approved decisions.

Lahasky v. Bd. of H. E. of City of N. Y.
410 N.Y.S. 2d 853 App. Div. 1978

It would be intolerable for the courts to interject themselves and to require an educational institution to hire or maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education.

Greene v. Howard University
271 F. Supp. 609
D.D.C., 1967

Same section reiterated in Frazier v. Curators of Univ. of Missouri 495 F 2d 1149, 1974

Also reiterated in Jones v. Hopper,
410 F 2d 1969

It would be a sad blow to institutions of higher learning and to the development of independent thought and culture if the courts were to step in and control and direct the administration of discipline and the selection of members of the faculty in universities and colleges.

Also in Greene v. Howard University
271 F. Supp. 609 (1967)

The University's standards are matters of professional judgment.

Green v. Bd. Regents at Texas Tech. Univ.
474 F 2d 594 5th Cir. 1973

As indicated by the previous quoted examples, many courts have hesitated to take a role in the decision-making process of faculty evaluation and have relied for the most part on the "expertise" of the administrative staff or faculty of the college or university. If this were now true in all instances, there would be little need for administrators to worry about court actions. However, as shown in the remainder of this paper, cases involving faculty evaluations are emerging more frequently. Courts are beginning to take more of a "hands-on" approach, causing more room for alarm and persuading administrators to look again at their processes for faculty evaluation in higher education.

DO COURTS LOOK AT STUDENT EVALUATIONS OF FACULTY?

> "Most professors believe they are good judges of their colleagues' qualifications as teachers. Yet, too many cling to the hypothesis that a good teacher can be expected to teach well. They presuppose that a colleague who has intelligence, clarity of expression, ability to explain complex issues, and a mastery of his subjects will automatically do a good job of teaching. I call this a naive hypothesis. In a major university study (anonymous), it was found that there was no correlation between teacher quality and success."[4]

More and more studies are proving that colleagues rely on impressions gathered at faculty meetings, seminars, and discussions in their evaluations of other faculty members. Thus, courts are now giving greater emphasis on student evaluations of faculty members' ability to teach when working in the area of evaluation. Three common purposes for student evaluation include helping 1) faculty to improve their teaching, 2) students to select

instructors and courses, and 3) administrators to make decisions concerning faculty salary increases and promotion.[5] The most common method employed in student ratings is the use of the questionnaire. Some questions require the student to rate the instructor on various attributes relevant to teaching ability while others include open-ended questions or invite suggestions and comments.

Mixed feelings arise from the use of student evaluations in the evaluation process of higher education faculty. Despite the fact that many researchers deny the reliability and value of student ratings, this method is nevertheless receiving increasing attention. Those persons in favor of the use of student evaluations support their beliefs with strong feelings.

> "Students may be wrong in their opinions as judged by some higher court of opinion, but students cannot be wrong if we want to attach a priori importance to their opinion." [6]

> "The use of student evaluations to rate college faculty on teaching merit is common practice on many campuses today. Every effort should be made to ensure that the administration and analysis of student evaluations be accomplished in the most objective and valid manner possible. For example, graduate students not assigned to faculty for whom they work should administer the evaluation during the first 20 minutes of class in the absence of the faculty member being evaluated. Questionnaires should be collected, sealed in an envelope, and returned to the department chairman. Students are, after all, the principal recipients of the teaching process and it is they, not administrators or colleagues, who spend the most time observing faculty in the performance of their teaching role." [7]

> "The courts are rightfully beginning to look at evaluation in terms of the results--student learning. One approach to the problem of evaluation is the Teaching Assessment Program (TAP) which has been developed and tested in universities, colleges, and

> secondary schools. The items being tested are the development of the student's intellectual or cognitive competence, not the content, but the process. The instruments measure not only the instructor, but the students and the various activities. The Supreme Court has ruled this evaluation procedure as a 'measure of job performance.'" 8

Jerry Alexander, on the other hand, represents the side of those educators saying that student evaluations should not have much emphasis on administrative decisions of faculty members. In his study, he found in a Southern university that students, when asked "If your rating affected your professor's salary, would you rate him lower, same, or higher?" It was found that nearly 50 per cent of the satisfied students would change their ratings (99% would go higher), but thirty per cent of the dissatisfied students would change their ratings (85% would go much lower). The study here suggests that if ratings were seen as possibly affecting a professor's salary, then students tended to raise or lower ratings to punish or reward a faculty member rather than objectively reporting perceptions of evaluation. For these reasons, many educators feel strongly against the use of students' ratings when analyzed for promotional decisions.[9]

McKeachie, who has probably written most extensively on the idea of student evaluation, takes a middle of the road approach. He feels that student ratings for personnel decisions must be valid and reliable in terms of accurate diagnosis of problems. Performance of students on a final exam is not an ideal measure of teaching effectiveness, for example. It is also a misuse to sum ratings on a group of items to compute a mean score. Student evaluations should and can be used effectively in personnel decisions if carefully analyzed.[10]

Whether or not one is in favor of the use of student ratings of faculty in the evaluation process is irrelevant when the courts are using these instances to support the decisions made by the administrative staff. Therefore the important function becomes one of handling the use of student evaluations in the most professional and reliable way possible for the most helpful kind of information.

DO COURTS LOOK AT PEER OBSERVATION AND EVALUATION OF FACULTY?

Peer observation and evaluation are relatively new concepts in the field of education and still have not been clearly defined in many institutions. The peer panels have taken on many of the managerial and supervisory functions of staff development, such as planning developmental activities, giving assistance to panel members, serving as a sounding board for problems and ideas, analyzing teaching, giving feedback, and evaluating for promotion purposes.

As in student evaluations of faculty, peer evaluations also are the source of mixed feelings. There are those who believe that putting teaching efforts into words and numbers are more harmful than helpful, more a part of the problem than a solution to it. There is also the problem of peer bias or capriciousness in the evaluation process. Often what peers think about the faculty member's instruction does not begin to correlate with actual student gains.

On the other hand, supporters of peer evaluations feel that in this area, one gets the most careful search for objectives, standards, and performance. Peer evaluations could, in fact, be a boon to teachers, not

the bane that many fear. They could be aimed at the educational development of the instructor, especially is they utilize reasonable evaluation devices for measuring teacher competence and effectiveness.

Courts have supported the use of peer evaluation when identified by institutions of higher education that this technique is an acceptable and proper part of the evaluation process at their institution.

WHAT FACULTY QUALITIES ARE EXAMINED IN THE COURTS?

Defamation of character

Many suits reach the court ears with a grievance against an institution of higher education that he was identified in a defamatory manner. It must be kept in mind that not all statements critical of a college or university employee will be considered defamatory. Generally speacking, defamation is that which tends to injure "reputation;" to diminish the esteem, respect, good will, or confidence in which a person is held, or to excite adverse, derogatory, or unpleasant feelings or opinions against that person.[11] It has not been held defamatory to report that a music director's resignation was "for the good of the department," to call a professor an "old biddy" not suitable for promotion, to describe a professor's scholarship and potential growth as "below average," to report that a professor's teaching ability would be more useful at a different campus, or to allege that neither the quality nor the quantity of a professor's scholarly work justified granting him tenure. On the other hand, it could be held defamatory to charge that a university instructor drinks liquor excessively, to report

that a professor has "ceased to be a useful member of the faculty," to allege that a college librarian obtained a position by claiming a degree she did not possess, to charge that a college lecturere is a "faker," or to report that the methods of instruction are "ridiculous." [12] If such a statement is made (or published) to one or more third parties and is untrue, then the victim of such defamation is probably entitled to recover damages. A number of privileges have arisen which can, however, shield a person from personal liability even though a defamatory statement has been made. The most relevant development in this regard from the point of view of a college professor is the new constitutional privilege mandated by the landmark case New York Times v. Sullivan in 1964.[13] This case indicated that so long as a defendant acts in good faith, he need not be absolutely certain of the truth. The purpose of this statement is to encourage debate and uninhibited interchange of ideas. This increases the potential danger in the area of defamation of the college professor, which in past history he has had the least amount of protection from the institution. [14]

Two court cases give an idea of how the courts have handled college instructors' complaints of defamation of character. The first case is Collins v. Wolfson, 498 F 2d 1100, 5th Circuit, 1974, in which seven college instructors sue the trustees of Miami-Dade Community College because of non-renewal of employment contracts. The major complaint of three faculty members was violation of their constitutional rights because of a n..e placed in their files charging neglect of duty for unexcused absences from campus in February, 1973. The U.S. Court of Appeals affirmed the District Court's judgment that placing the negative memos in the files gave rise to no constitutionally

based grievance. "There is no averment that the presence of these documents has in any manner checked their exercise of First Amendment rights."

The other defamation court case (John R. Greenya v. George Washington University, 512 F 2d 556, D.C. Circuit, 1975; 423 U. S. 955, 1975, Cert. denied) involved a termination of a part-time off campus instructor. Greenya complained of violation of civil rights, defamation, and breach of contract. In the area of evaluation, he claimed defamation because he found on a 3X5 index card in the Office of Academic Staffing made by his department chairman stating "Do not staff." However, the courts ruled that this information had not been published and was not outside the normal channels. The courts supported the University and claimed no defamation of character.

As seen by these two examples, it is very difficult to prove "defamation of character" and frequently the plaintiff is required to prove actual damages before he can recover any. In the area of faculty evaluation, one must be careful what is put in writing in a faculty member's record, or what is said regarding his personal life or attributes, even if courts tend to support past actions of institutions.

Immorality

How do you evaluate immorality of faculty in higher education? Before the 1970's teachers were evaluated and dismissed for such offenses as falsifying an application for a liquor permit (Batrus' Appeal, 148 Pa. Super., 587, 1942), falsifying attendance records (Bd. of Ed. v. Weiland, 4 Cal. Rptr. 286, 1960), and soliciting support from teachers in an attempt to oust the superintendent. (Watts v. Seward School Bd. , 395 P. 2d 372, 1964).[15]

Since the 1970's many court cases have indicated the court's harshness of teacher evaluation regarding the area of immorality:

1. Use of the poem "Getting Together," calling for freedom to use LSD and marijuana, to take off one's clothes in public, and to be sexually promiscuous was looked down upon by the board of education and the teacher was dismissed. The courts upheld the board's actions of dismissal based on the apparent immorality of the teacher.

   Brubaker v. Bd. of Education
   502 F 2d 973 (7th Cir., 1974)

2. A Junior college instructor was fired for his immoral acts of simulating licking the wall with his tongue up and down repeatedly as example of the superintendent's usual actions. He was fired on the grounds of his immoral behavior and his unfitness to teach. This was upheld by the courts.

   Palos Verdes Unified School District
   v. Hensey 88 Cal. Rptr. 570 (1970)

3. A teacher was dismissed because of his immoral behavior of actions with a mannequin in a store in what witnesses interpreted as a form of masturbation. The courts supported the firing of the teacher.

   Wishart v. McDonald 367 F. Supp. 530
   D. Mass., 1973

4. Courts upheld the dismissal of a California teacher who had been arrested and charged with a felony because she had performed oral copulation with two men at a swingers party, neither of whom was her husband.

   Pettit v. State Board of Educ.
   513 P. 2d 889 (1973)

5. Teacher was dismissed when arrested for the unlegal possession of marijuana. Upheld by the courts.

Comings v. St. Board of Educ.
100 Cal. Rptr. 73 (1972)

6. High school teacher was discharged from employment on the grounds of immorality because he was a known homosexual. The recent evaluation of his teaching performance was quite favorable. "Mr. Gaylord continues his high standards and thorough teaching performance. He is both a teacher and a student in his field." The courts found that he was guilty of immorality even though he never discussed his feelings with students or other teachers. They claimed that his fitness as a teacher was impaired to injury of the school in which he taught and therefore justified his discharge. (5-2 decision).

Gaylord v. Tacoma School District No. 10
559 P 2d 1340 Supreme Ct. of Washington,
1977

It appears that in the area of immorality in the evaluation process, courts are now looking at immorality as an almost equation to unfitness to teach. They look in disfavor at any intimate acts which abuse teacher-student relationships. They nearly equate the use of drugs with an unfitness to teach. Homosexuality is not in and of itself a cause of dismissal, but if it interferes with the teaching act, then it becomes a problem which needs to be alleviated.

Although immorality is difficult to evaluate in the area of higher education, it is important to note that courts have looked very disfavorably upon immorality in the teaching field. If this area becomes hazier in the future, courts will probably back the decisions of the administrators in higher education.

Overt Undesirable Behavior

Another ambiguous area which arises in faculty evaluation procedures is that of overt or undesirable behavior on the part of the faculty member. These situations take many forms as seen in the following cases:

1. A university professor, Eugene Kassman, was appointed to a one year contract in 1970 to develop and administer an educational program in conjunction with a series of summer performances by students and distinguished artists. His contract was extended for an additional year, but in 1972 the Dean of Arts and Sciences notified him that his contract would not be renewed for the next academic year. The reason for his non-renewal was a series of disagreements between Kassman and Ultan, Chairman of the Department of Music. Kassman accused Ultan for his dismissal, while Ultan denied responsibility for his discharge. The District Court ruled in favor of the University, but awarded Kassman $15,000 as compensatory damages. Even though the Appellate found that the chairman acted without justification, they affirmed the decision, but remanded the case to the district court for financial settlements.

   Eugene Kassman v. American Univ.
   546 F 2d 1029 D.C. Cir., 1976

2. A Colorado State College professor was dismissed because of several various types of mentioned behavior:

   a. attack of an English department textbook in a student newspaper

   b. founded an anti-Vietnam publication

   c. supported a draft-dodger student

   The courts found that: "The Board of Trustees certainly has broad discretion over the teaching staff and is charged with the duty of operating the school in an orderly, effective, and professional manner. They can discipline and discharge those whose actions unduly interfere with teaching programs or with the teaching by others on the staff, or otherwise seriously disrupt

the operation of the school."

George Jones v. Hopper, Pres. of S. Colorado State College and Members of the Bd. of Trustees

410 F 2d 1323, Tenth Cir., 1969

3. Several students and faculty were dismissed for actively participating in threats, commotions, fires, and other disruptive incidents at Howard University. Faculty involved all had temporary appointments and all received letters of notification of non-renewal. Courts backed the decision of the University in their dismissal of the faculty members. "History demonstrates that centers of higher learning can best develop and flourish in an atmosphere of liberty and independence, where they are free from governmental influence in any respect of their activities , unfettered by any intrusion on the part of the courts."

Greene and Hare v. Howard Univ.
271 F. Supp. 609
D.C. 1967

4. An associate professor of foreign languages was not renewed at Indiana Univ. of Penn. at Indiana. She (Eleanor Roseman) felt that they retaliated against her for her free speech and her religious beliefs. What she had done was to use open forums to express her disgust for her department chairperson! The University followed the procedure of an 11 faculty-committee who evaluated the plaintiff's performance. They called several shortcomings to the plaintiff's attention. This Committee of Merit and Tenure decided not to renew the plaintiff's contract by a vote of 10 affirmative to 1 abstention. This decision was ratified by the University officials.

The courts backed the University totally. They found that the "Plaintiff was non-renewed because of her work practices which created administrative hardships and delays, her inadequate classroom performance, and her failure to get along

amicably in the department." She had to pay all court costs.

Eleanor Roseman v. Indiana Univ.
of Penn. at Indiana
520 F 2d 1364 U. S. Ct. Appeals
3rd Cir., 1975

5. After two years as an assistant professor of sociology and anthropology, Poddar's department chairman requested Poddar's promotion to associate professor. Such a request was turned down because it was not a practice to promote after just two years. The appellant was very vocal about his dislike for the University's promotion policy and attempted to see it changed. In this endeavor, he used his classroom as a forum to air his views. As a result of such overt actions, the University decided not to renew his contract and he was given a one year terminating contract. He took the University to court on the basis of his right to exercise free speech guaranteed him by the First Amendment. The District court found that the "plaintiff's attitude and behavior impeded proper performance of his daily duties within the department."

The Court of Appeals also affirmed. "No violation of due process, no violation of First Amendment rights were found. The University was not arbitrary, capricious, unreasonable, nor discriminating. There is no common right law for higher education that assures reemployment."

Poddar v. Youngstown State University
480 F. 2d 192 U.S. Ct. Appeals, 6th
Cir., 1973

As seen by the previous court cases involving faculty evaluation of undesirable, overt behavior, the courts have supported the institutions of higher education on their decisions of non-promotion or dismissal because of such acts. If a college or university hires a faculty member, it has the right to expect some sense of allegiance by the instructor to the institution and the courts will back this feeling in a legal battle.

Incompetence

Incompetence in the teaching field is an area in which the courts have struggled in their decisions. General reluctance of courts to attach a definitive meaning to the term "incompetence" makes decisions even more difficult. In the past, incompetence has meant inability, incapacity, lack of ability, unfitness to discharge the required duties, lack of effectiveness, or even weakness.[16]

One case which exemplifies the area of incompetence in a higher education law case is that of Frazier v. Curators of the University of Missouri, 495 F 2d 1149 (8th Cir. Ct., 1974). Dr. Harriet Frazier was a non-tenured assistant professor of English at the University of Missouri, Kansas City. She had been hired in 1967 for a one year term. It was detailed to her at this time that "holders of academic staff positions under term appointments shall have no rights of permanent or continuous tenure...it shall not be necessary for the dean or department chairman to provide any causes or reasons for not recommending reappointment."

She was reappointed for two additional one-year contracts. Then, for the 1970-71 year, she was given a terminal contract. She claimed that her dismissal was due to her extreme difficulties with one colleague and one student.

Although not required to do so, Dr. Farnsworth, Chairman of the Tenure Committee, notified her in writing of the reasons for the committee's decision to terminate her association with the University. The letter which follows indicates the necessary evidence, backed by the courts, for termination based on an evaluation of competence.

At your request, I shall summarize in writing the discussion of the Tenure Committee which led to the Committee's vote to offer you a terminal contract for the school year 1970-71.

The Committee first considered your status last fall. There was at that time considerable question about your judgment and emotional balance stemming from your inability to meet your classroom obligations the previous spring and your emotional appeals to the Dean and the Chancellor. However, it was then decided to defer judgment on your status until this spring, recognizing that this meant assuring you a contract for 1970-71. This meeting was the basis for the letter you received from Dr. French assuring you of a contract for next year.

The Committee met again on April 24th and 28th to discuss your status. The members of the Committee emphasized various points in reaching their collective decision. There was general recognition that you were adequately fulfilling your minimal responsibilities during this last year, but the Committee still had serious reservations about your effectiveness as a teacher and scholar suited to our particular needs. The student evaluations, while not harshly critical, seemed lukewarm. One committee member was particularly disturbed by the students describing the learning method in your Shakespeare classes as "rote memorization." This criticism was reinforced by committee members' testimony that they were unimpressed with your critical ability in informal discussions and in discussions arising from departmental duties. Some committee members feel that your critical approach is rather pedantic. It is concerned too frequently with insignificant scholarly minutiae and ignores central critical problems.

There was some feeling that a teacher of Shakespeare is in a key position in our department and that we need a person particularly in this area who will attract students to our program and who will win respect for critical scholarship.

As a general summary, the committee recognizes that there is some evidence of teaching effectiveness and scholarly abilities, but it does not consider your performance of sufficient strength to encourage you to think of becoming a permanent member of our department.

The members of the committee making this decision were Professors Aryanpur, Cappon, Farnsworth, Jaffe, McLeod, Ryan, and Spatz.

We have agreed to hear your response to our decision. I would like to set the meeting for 9 a.m., May 14.

The Circuit Court affirmed the decision of the district court to support the college's act of dismissal based on incompetence of teaching and scholarship. "The University tenure regulations were entirely proper."

In the case Bd. of Trustees of Mount San Antonio Junior College District v. Hartman (Cal. App.), 55 Cal. Rptr. 144 (1966), the head of the catalog department of the medical center library of the University of California was relieved of her non-tenured position for reasons of incompetency. ("Her supervisory relationship with subordinates made it impossible for this employee to be retained.") Both the trial court and the court of appeals found this termination justified because she was "discharged because she lacked supervisorial qualifications."

In the case Kondos v. West Virginia Board of Regents (W. Va.), 175 S.E. 2d 165 (1970), Peter Kondos, an assistant football coach at Marshall University, was informed after serving one year in this capacity that he was being dismissed. "This recommendation is based on the judgment that you have performed your duties as assistant football coach in an incompetent manner."

He sought an appeal to the Board of Regents, and was informed by that body that it had dismissed his appeal and confirmed the action of the President at Marshall. He then went to the Supreme Court of Appeals in West Virginia, asking for a writ of mandamus to compel the Board of Regents

and the president to reinstate him for the duration of his contract (six additional months). The writ was denied.

Because he was from another state, Kondos went to the U. S. District Court, suing the Board of Regents for breach of contract and suing the president for libel and slander. (Kondos v. West Virginia Bd. of Regents, U.S.D.C., W.Va., 318 F. Supp. 394, 1970). U.S. District Judge found that the doctrine of "sovereign immunity" prevailed in full force by a clause in the state constitution forbidding suits against the state or its agencies while engaged in governmental functions. The president could not be held liable either for breach of contract or slander because he was protected by the same doctrine unless it proved to be that he acted malciously or corruptly. Suit was dismissed.[17]

Although difficult to prove an exact definition of incompetence, courts have tended to support the decisions of the "experts" in higher education, with the added note that in virtually no case has a single reason been used as the basis for dismissal when dealing with incompetency issues.

Lack of qualifications

It is just as difficult to indicate preciseness in qualifications once a person has been hired to teach a certain set of courses. One case in particular, Rainey v. Jackson State College, 481 F 2d 347 (5th Cir., 1973) handles this problem in detail. Mr. Kenneth Rainey was given a renewal contract as an assistant professor of English, but shortly thereafter, received the following letter:

Dear Mr. Rainey:

> This is to inform you that the contract for your services as an Assistant Professor of English which was mailed to you on May 9, 1970, was sent inadvertently by my secretary who had affixed my rubber-stamped signature without permission. Moreover, your name had not been submitted to the Board of Trustees for approval which is a prerequisite to employment.
>
> I regret to inform you that the position for which you were being considered has been eliminated by a budget amendment to provide necessary funds for increasing the Jackson State College Security Force. This amendment was approved by the Board of Trustees on August 20, 1970.
>
> We shall be happy to offer our assistance in helping you to find other employment.

Sincerely yours,

John A. Peoples, Jr., President

This letter was mailed to Mr. Rainey on August 20 regarding the next academic year. At a hearing requested by Rainey, Mr. Stone, President of the Board of Trustees, explained why the Board, acting on the recommendation of its Special Education Committee had decided on August 19 and 20 that the College should not employ Rainey in 1970-71. He stated:

> Now, there were several reasons why the Board members questioned your appointment. Primarily, there was much publicity about your statements concerning the motion picture entitled "The Fox." The Board members expressed grave concern that the publicity centered around your testimony at the obsenity trial would be detrimental to your effectiveness as a professor at Jackson State....

When Jackson took these data to court the defendents (Jackson State) showed that the plaintiff, being an ordained minister, was not primarily qualified to teach English. The courts ruled for the College, with both

sides splitting the court costs.

It is interesting in this case, even with such unusual and obvious reasons for dismissal, that the courts agreed with the college that Rainey was not "qualified" academically for his present position.

HOW DOES WEST VIRGINIA HANDLE FACULTY EVALUATION?

In the Amended Policy Bulletin No. 36[18] the West Virginia Board of Regents states several items dealing with evaluation procedure. For example, under the section entitled "Promotions," it is indicated that

1. There shall be demonstrated evidence that the promotion is based upon a wide range of criteria such as: excellence in teaching, significant contribution and service to the college community, experience, academic achievement, professional growth, research, potential for continued professional growth, and service to the people of the State of West Virginia.
2. There shall be demonstrated evidence that in the process of making evaluations for promotions there is participation of persons from several different groups such as: peers from within and from without the particular unit of the institution, department chairperson, dean, and students.

Under the section entitled "Faculty Performance Review" it is also stated

a. All full-time and nontemporary faculty shall receive a periodic review of performance directly related to assigned teaching and other assigned responsibilities. The review shall be conducted at least once a year for all full-time and non-temporary faculty and may be performed more often for probationary faculty.
b. Review procedures shall be developed at the institutional level and submitted to the West Virginia Board of Regents for approval.

West Virginia University has developed specific evaluation procedures in writing which are important to examine in light of the appropriateness to the court cases discussed in this paper.

Specific sections dealing with the evaluation process will be highlighted.

2.0 The criteria to be used are set forth in the Faculty Handbook, Sec. 2, pages 4 and 5, and the Board of Regents' Policy Bulletin 36, revised May 8, 1979. Each unit should have elaborated on these criteria to take into account the distinctive character of their discipline.

In weighing the merit of an individual faculty member for retention or advancement, the total professional qualifications and performance of the member are to be considered. The faculty member must demonstrate continuing professional development in ways appropriate to her/his discipline. Primary weight is normally given to the excellence of the faculty member's performance and promise in at least two of the three major functions of the University: teaching, research, or other creative scholarship, and service. 19

4.0 <u>The Evaluation Process</u>

University criteria as elaborated and specified by the respective program units shall be used in making faculty evaluations. The specific work assignments of the individual are to be taken into account.

The primary evidence to be weighed is contained in the faculty member's file. To it is added professional judgments of the quality of the member's scholarship, teaching and performance, and public service.

Faculty colleagues (members of the evaluation committee) make a professional judgment of the strength and limitations of the member. The chairperson adds her/his independent, professional judgment and has the further responsibility to take into account the probable future faculty needs of the program unit.

Evaluation and reviews are carried on at three levels of University organization: Department, School-College, and Vice-President.

School-College faculty committees and deans weigh the evaluations made in departments and also consider appeals in cases where the faculty member appeals a negative departmental decision. College committees and deans also have the responsibility for determining that departmental recommendations are conducted fairly and for assuring that roughly comparable norms are applied in like units.

> The next level of review is made in the Office of the Vice President for Academic Affairs or in the Office of the Vice President for Health Sciences. The Vice Presidents will be assisted in their review by an advisory committee, including members of the faculty.
>
> Final decisions on promotion and tenure recommendations will be made by the President of the University.
>
> The individual faculty member may appeal a negative decision at any level (see 7.4). A careful record of procedures and of substance is to be made at every level of the review process. [20]

Further in the document, steps are outlined at the departmental, the college, and at the Vice President levels for specific attention to evaluation procedures at that particular level. (7.0, 7.1, 7.2, and 7.3). The purpose of each of these set of directions is to make certain that the evaluation process has been consistent with the University policies and objectives, that the faculty member has been treated fairly, that there is supportable documented evidence for statements made, and that faculty members are appropriately advised within the proper timetables of decisions reached.

In analysis of West Virginia University's faculty evaluation procedures and the court cases examined, it would seem safe to conclude that any faculty member who is evaluated according to the specified guidelines would have a difficult time in court proving any procedural grievances. The specificity of the faculty evaluation process is remarkably well conducted. In the not so distant future, West Virginia University, along with other higher educational institutions, may need to develop more formalized systematic means for making all personnel assessments. Interviews and evaluation instruments may need to become more valid. An examination of specific guidelines may be in line in the future of faculty evaluation.

SUMMARY: AN ANALYSIS BASED ON FACULTY EVALUATION COURT CASES

As the period of financial retrenchment in higher education continues to increase in severity, so will the increase in court cases involving evaluation. Termination of a faculty position may mean more than a move in location to a different institution. It may mean removal from the higher education profession. Under these conditions the decision to stay, protest, and if necessary fight a dismissal, rather than leave, becomes attractive.

With the uprising of court cases, higher education administrators must do a more thorough job of faculty evaluation than in the past. In 1966, (Raney v. Bd. of Trustees, Coalings Jr. Col. District, 239 Cal. App. 256, 48 Cal. Rptr. 555 Dist. Ct. App. 1966), the court found the following five reasons adequate evaluation for termination:

1. His philosophy...with respect to grading is unsuitable for the junior college level.
2. He has an extremely "tough" attitude towards students which causes excessive dropouts during the semester and between semesters.
3. His grading is too severe.
4. He is too sarcastic toward students.
5. His general reputation among faculty, students, and the community is that of a contentious person. 21

Even in 1973 (Duke v. N. Texas State Univ. et. al. 469 F 2d, 1972 Cert. Denied 412 U.S. 932, 1973), courts found the following evaluation statements adequate for dismissal of a female higher education faculty member:

1. Her actions and statements before a group of students and her participation in meetings which violates the rules and regulations of the university impair her

efficiency as a teacher and her judgment as a scholar.

2. By her actions and statements upon the occasions in question, Mrs. Elizabeth Duke failed to recognize and appreciate that the public will judge North Texas State University and its teaching faculty by such statements and actions, thereby demonstrating the lack of professional integrity required of the teaching faculty at North Texas State University.

The courts have generally taken a hands-off approach to faculty evaluation. When they did take a stand on court cases it appears that the courts have supported the institution of higher education in every case examined if that institution followed an appropriate evaluation procedure.

The federal courts have recognized the absolute necessity that any higher education institution must be vested with substantial discretion in the establishing of standards for the selection and evaluation of faculty and must be able to exercise judgment in the application of those criteria to the evaluation of the person. The institution has every right to insist on certain standards in the areas of teaching, research, and service which must be met by a candidate for promotion or tenure, with the likelihood that the federal courts would be supportive of the institutions' rights to determine such standards.[22]

There exists a definite need for better evaluation processes. Courts have examined a variety of faculty qualities such as defamation of character, immorality, overt undesirable behavior, incompetence, and lack of qualifications. Yet faculty members are rarely dismissed on any of such specific grounds. They are dismissed for criticizing the administration, for collectively organizing faculty, for lack of collegiality, or for teaching

unpopular ideas. The problem lies either with poor hiring procedures or weak or nonexistent evaluation policies.[23]

Objectivity in educational evaluation must be rooted in a scientific approach to evaluation. Peer and student evaluations must be considered. People competent in the use of evaluative methods need to be trained in how to measure conveyance of learning. Researchers are only beginning to develop tools and concepts for the evaluation and study of teaching performance. Recent evidence suggest that some educational researchers and organizations are already moving in these directions. Zedek, for example, has developed behaviorally-anchored rating scales useful for assessing teacher effectiveness. The Selection Consulting Center in Sacramento, California, has prepared a formalized program for developing and validating instruments, for example, application forms, personal interviews, etc. used in the selection of teachers. These are but a few of the recent attempts to assess teachers and their behaviors objectively. However, particularly in the area of performance evaluation of faculty, further work will be needed in the future to make these assessments in a legal fashion.[24]

RECOMMENDED GUIDELINES AND FUTURE CONSIDERATIONS

When considering the higher education academic world of the 1980's and 1990's with relation to faculty evaluation, it becomes imperative to examine guidelines for both the faculty member and the administrator. If the standards currently being applied to performance evaluation are examined carefully, it is possible that many higher education present evaluation systems may be found in violation of the law. Guidelines for developing, understanding, and administering these evaluation systems are needed desperately.

How can a faculty member begin to protect himself in the increasing demand for accountability through the frequent evaluation procedures? The following points offer suggestions for consideration. Faculty members should:

1. be aware of and get to know the next highest person in administrative authority. When a problem arises, contact this person first.
2. try to have a third neutral party present when dealing with a "hot" issue with either students or administration.
3. keep and maintain written memoranda of conferences and/or telephone conversations.
4. be aware that nothing can be assumed to be confidential if told to a student or a colleague. 25
5. keep up to date written personal records of all academic accomplishments, service, and honors.
6. utilize the student evaluation process of the institution and for added strength, design self-evaluation forms for classes to respond to other types of questions.
7. keep all records from the time of hiring (contracts, faculty handbook, catalogs, etc.) in a chronological file.

8. not attack verbally and publicly the department chairperson, dean, or president of the institution.

9. keep current about new laws, rules, regulations, or policies which might affect the teaching position.

10. try to remain out of the "losing" categories such as "immoral, behaviorally undesirable, or incompetent."

Each administrator, in turn, from the department chairperson to the chief executive officer, is vulnerable to courtroom review in matters of faculty evaluation. Several guidelines, based on the past court cases, can be suggested for administrators in higher education for the coming decades. For example, administrators should:

1. become knowledgeable concerning the ever-changing legal obligations and rights of public/private institutions toward faculty evaluation.

2. be certain of his/her role as an administrator in carrying out the evaluation policies and practices of the institution.[26]

3. make certain that the evaluatio process of each faculty member is job-related.

4. be sure that the faculty evaluations are not discriminatory in intent, application, or results.

5. be certain that evaluation forms contain precise and uniform language and should be statistically valid.

6. guarantee that evaluators at the institution are trained in how to use and analyze evaluation instruments.

7. provide for the performance evaluation process to include the appropriate variety of represented groups: students, faculty peers within and without the department, and administrators.

8. insist that performance evaluation procedures be conducted in entirety before making any changes in personnel decisions.

9. inform faculty members in writing of the results of their performance evaluation.

10. see that their institution develops thorough written policies pertaining to the use of faculty evaluation, procedures for administration, and various rules which may govern any decisions rendered.27

11. make certain that these policies are communicated to all newly hired faculty members before they sign their first contract so that both parties fully understand the entire evaluation process.

12. provide for consistency of standards and procedures of faculty evaluation.

13. work for improved administrative-faculty communications to keep evaluation procedures "above board."

14. create a sense of fairness in facing evaluation problems.

15. not take rash action to mere "hear-say" of other faculty members.

16. check on current insurance policies for maximum coverage permitted by law (for possible cases of administrative liability in evaluation.)

17. employ legal counsel who has a good knowledge of the institution, its organizational structure, policies, and goals.

18. have this legal counsel keep the administrative staff and faculty, as well as students, current on their rights in the entire evaluation picture.

The above faculty and administrative guidelines will not guarantee victory in a courtroom, but if followed judiciously, the probability of facing an evaluation suit is greatly reduced. It cannot be overemphasized that with our current economy, dropping birthrate, and abundance of earned doctorates, that the next decades will be unique to institutions of higher education. Faculty and administrators must prepare themselves in every way possible to face the faculty retrenchment problems of the

present and future. They must face the problems with appropriate evaluation devices and proper legal knowledge.

> "The greatest danger to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."
>
> Powe v. Miles
>
> 407 F 2d 73 (2nd Cir., 1968)

FOOTNOTES

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[13]N. Y. Times Co. v. Sullivan, Ala. 376 U.S. 251, 1964.

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